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## **Transformative Constitutionalism And Right To Elementary Education: An Evolutionary Analysis With Special Reference To The Constitution Of India**

**Akshay Jain**, Ph.D. Research Scholar, Gujarat National Law University (GNLU), Gandhinagar, India. E-mail: akshayjain.fylc@gmail.com

**Dr. Girish R.**, Assistant Professor of Law, Gujarat National Law University (GNLU), Gandhinagar, India. E-mail: rgirish@gnlu.ac.in

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**Abstract:** Transformative constitutionalism seeks to bring fundamental changes in nation's social institutions through identification and invocation of transformative goals in its constitution. Albeit the scope of such changes may extend to uncountable aspects of social life, howbeit, this article focuses on transformation of education rights in India through constitutional means. The constitution makers had enacted the Indian constitution with a transformative vision to enhance and promote elementary education in India through the constitutional directive of State's duty to provide free and compulsory education to all the children which was further nurtured by the Supreme Court of India by declaration of right to education as an integral part of right to life. Eventually, right to elementary education found its place as a separate fundamental right in the Indian constitution. In aforesaid context, this article analyses the role of transformative constitutionalism in making elementary education as the part of fundamental right in India.

**Keywords:** Transformative Constitutionalism; Indian Constitution; Elementary Education, Right to Education.

### **1. Introduction**

Transformative constitutionalism connotes the idea of bringing transformation in social and political institutions of the society through constitutional means. The core idea behind such transformation is to heal the wounds of the past and guide us to a better future (Langa, 2006, p.352). In the words of Karl Klare, 'transformative constitutionalism' refers to a long term project of constitutional enactment, interpretation and enforcement which is aimed towards transforming social institutions of a nation to undo injustices of the past (Klare, 1998, p.146). In Indian context, transformative constitutionalism may refer to a process of constitutional enactment through which, the constitution makers gave shape to the transformative

vision of Indian constitution with the aim to transform the lives of Indian people by undoing the injustices suffered by them in the British colonial rule. The spirit of such transformative constitutionalism is further upheld by the judges of the Supreme court and the High courts. Moreover, the executive branch under the constitutional mandate enforces the law in the manner as declared by the courts so as keep the principle and practice of transformative constitutionalism in motion.

Among various facets of social transformation, right to elementary education, is one of the untouched areas which has undergone tremendous transformation from the time of British colonial era to the contemporary time of independent India. Although unmentioned in the express words of the judgements of the Supreme court and High courts, the driving force behind such transformation owes its foundations to the principle of transformative constitutionalism. Such proposition can be well corroborated with a simple comparison of the facts and circumstances pertaining to literacy of people of India before and after advent of British rule in India. For instance, as pointed by Will Durant in his work *The Case for India* (Durant, 1930, p.31-35), it has been clearly pointed out that before the advent of Britishers in India, education was provided through schools established at the village level henceforth ensuring a good literacy rate among children. However, these village communities and schools were deliberately destroyed by the Britishers and no measures were taken to establish new schools. Further agitating the miseries of Indian children, the schools which were established by the erstwhile colonial government were not free and the tuition fee charged by them made such schools beyond the reach of the already impoverished common man. Conclusively, the Britishers left India in the year 1947 with a meagre literacy rate of 16% (Tharoor, 2016, p.215-216).

It is needless to mention the general but vital importance of right to elementary education in one's life as the same forms the very foundations for overall growth of an individual which qualifies it to be a fundamental right of an individual. However, history evinces that the Britishers were not interested in improving or even maintaining the existing education system in India, let alone the elementary education system, and the same was excessively degraded to enslave the minds of Indian people. These atrocities were duly addressed by the constitution makers in the Constituent Assembly of India (Austin, 1972, p.2) wherein right to free and compulsory elementary education became a much-debated subject. For instance, at the very initial stage of constitution making, the right to elementary education was proposed to be included as a positive right for ten years from commencement of the Constitution which was in the form of only a directive to the State and did not impose any mandatory duty on the State to provide free and compulsory education to children for the reason of it being impracticable in nature. To this, Prof. K.T. Shah, an eminent member of the Constituent Assembly, opposed such approach while advocating for a mandatory duty of the State to provide free and compulsory

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elementary education to children as a matter of their right. While advocating for mandatory duty of the State, Prof. K.T. Shah duly acknowledged and invoked the transformative vision of the Constitution to learn from the injustices of the past and disestablish the same for a better and promising future for children of India. He stated that, "I suggest, Sir, that many things look impracticable until they are tried, and become practicable if they are retried. Nothing in practice is practicable until it is tried. Take even the elementary right to education which every civilised Government is now undertaking to provide for the children of the nation. Even this right to compulsory primary education has been provided for in such a clumsy, half-hearted and hesitating manner that one wonders whether the framers of this Draft were at all anxious that the curse of ignorance that has rested upon us all these years should be removed at all. The provision made here just permits the State, even within the period of ten years, only to "endeavour" to give effect to this aspiration. Even there it is not compulsory, even such an elementary right as the right to primary education for every child in the nation is not mandatory. As such I feel Sir, that unless some change is made, unless you make these preemptory obligations mandatory duties of the State, the State or the constituent parts of it may not at all attend to these duties of the State. These are most elementary duties in my opinion, duties which are most primary duties, if I may say so, most sacred that no one should try to insult this House by suggesting these are not practicable." (Shah, 1948)

However, even after efforts of various constituent assembly members like that of Prof. K.T. Shah, free and compulsory elementary education did not find its place in Fundamental Rights (Ind. Const. pt. III, arts. 12-35) at the time of constitutional enactment in the year 1949 but the same was provided under Article 45 of the Constitution which formed a part of the Directive Principles of State Policy (Ind. Const. pt. IV, arts. 36-51). It was only after the Supreme Court declared the right to education as the fundamental right covered under right to life enshrined under Article 21 of the Constitution, the Parliament amended the constitution to include right to free and compulsory elementary education as a separate fundamental right under Article 21A.

In light of the foregoing paras, this article unveils the origin, evolution and development of right to elementary education in India which principally rests upon the principle and practice of transformative constitutionalism. Despite its crucial importance in the domain of constitutional jurisprudence as well as educational rights in India, this facet of right to elementary education in India is still unvisited in the relevant research works. Hence, this article will analyze the said subject matter in order to fill in the existing research gaps with respect to role and importance of transformative process in constitutional enactment and interpretation which

eventually led to culmination of the idea of free and compulsory elementary education in India into a full-fledged fundamental right.

## **2. Method**

This research article uses doctrinal method of research for examining the role of transformative constitutionalism in ensuring right to free and compulsory elementary education in India. Since the subject of transformative constitutionalism necessitates a comparison between historical facts with existing state of affairs, this article takes into account relevant historical texts and constitutional documents so as to analyse the developments in in the idea of right to free and compulsory elementary education in India. Further, the role of courts through constitutional interpretation plays a vital role in bringing the principle of transformative constitutionalism into practice. Hence, analysis of relevant judgements relating to right to education are also examined in the light of the principle of transformative constitutionalism.

This method is employed in this research work so as to identify and fill in the research gaps in existing legal literature as the subject matter is not sufficiently explored in the constitutional jurisprudence of India. The primary and secondary sources used in this research article includes but are not limited to constitutions, statutes, research articles, case laws, reports, books, journals et al. This research article takes into account authoritative sources relating to the subjects of constitutional law, transformative constitutionalism and educational rights in India along with such supplemental sources which are necessary for efficacious analysis and examination of the subject matter of this research article.

## **3. Origin of the idea of right to elementary education in colonial era**

The roots of education in India can be traced back to tenth century BC with establishment of the University of Taxila (Marshall, 2013, p.10). Historical evidence prove that ancient India was a global center for learning. Hence, it would be difficult set any time period for origin of educational rights in India. However, the constitution of post-colonial independent India largely owes its origin to the constitutional enactments of British colonial era. Hence, this article would analyze the origin and evolution of the idea of right to elementary education in modern India so as understand its place in the existing constitutional framework.

The first traces of the idea of right to free and compulsory elementary education can be found in the text of Constitution of India Bill 1895 (Rao, 2021) in its Clauses 25 & 26. The Clause 25 of the Constitution of India Bill 1895 provided that, "State Education shall be Free in the Empire." and Clause 26 provided that, "Primary

Education shall be Compulsory in the Empire.” While prescribing for the right to free elementary education among various other rights, this draft bill was the first unofficial attempt at proposing a draft of an indigenous constitution for India.

Thereafter, Clause 7(d) of the Commonwealth of India Bill 1925 (Rao, 2021) in another attempt for a demand of indigenous constitution for India prescribed for free elementary education as a fundamental right of every person in India. Clause 7(d) of the Commonwealth of India Bill 1925 provided that, “All persons in the Commonwealth of India have the right to free elementary education, and such right shall be enforceable so soon as due arrangements shall have been made by the competent authority.”

After such attempts for an India-made constitution, in February, 1928, the working committee of the Indian National Congress in accordance with the directions contained in its Madras Resolution of 1927, constituted a committee for drafting of an indigenous constitution for India. The committee said committee was headed by Shri Motilal Nehru (the father of first Prime Minister of independent India, Shri Jawaharlal Nehru) due to which the committee was popularly known as the Nehru Committee the report submitted by the said committee came to be known as the Nehru Report 1928 (Rao, 2021). The Nehru Report in its recommendations for an indigenous constitution prescribed for various fundamental rights of the citizens, among which, the right to free right to free elementary education was also proposed in Paragraph 4(v). Paragraph 4(v) of the Nehru Report 1928 provides that, “All citizens in the Commonwealth of India have the right to free elementary education without any distinction of caste or creed in the matter of admission into any educational institutions, maintained or aided by the state and such right shall be enforceable as soon as due arrangements shall have been made by competent authority.” The said right expressly ruled out any discrimination on the basis of caste and creed in the matter of admission into state aided educational institutions.

In the aforesaid context, it is relevant to note here that even after such proposals for making right to free and compulsory elementary education as a fundamental right, none of the subsequent constitutional enactments passed by the British Parliament such as the Indian Councils Act 1909 (9 Ed. 7, c. 4); Government of India Act 1915 (5 & 6 Geo. 5, c. 61); Government of India Act 1919 (9 & 10 Geo. 5, c. 101) and Government of India Act 1935 (26 Geo. 5, c. 2), ever prescribed for any fundamental rights of the people of India, let alone the right to free and compulsory elementary education.

The aforesaid facts and circumstances not only provide a clear picture of the origin and evolution of the idea of right to elementary education in India in Indian constitutional history, but the same also evinces the utter disinterest of the British

colonial government in providing any right relating to elementary education to the people of dominion of India.

#### **4. Free and compulsory education as a constitutional directive**

After gaining independence in the year 1947 vide India Independence Act 1947 (10 & 11 Geo. 6, c. 30) from the British colonial rule, the Constituent Assembly of India completed the task of constitution making for independent India and the Constitution was enacted and adopted on 26 November 1949 (Ind. Const. pmb.). However, the Directive Principles of State Policy along with various other parts and provisions of the Constitution came into force on 26 January 1950 in accordance with Article 394. The said directive principles under Article 45 of the unamended and original Constitution specifically provided for State's duty to provide free and compulsory education for all children upto the age of fourteen years. Thus, a positive right to free and compulsory elementary education was duly prescribed by the constitution makers while keeping in view the transformative purpose with which the Constitution was enacted.

However, it is interesting to note that immediately after the first sitting of the Constituent Assembly in December 1946, the Professor K.T. Shah, one of the members of the Constituent Assembly, sent a comprehensive note dated 23 December 1946 on the subject of fundamental rights to the President of Constituent Assembly which contained fifty-nine draft clauses on fundamental rights of citizens and minorities (Rao, 2021). Clause 41 of those fifty-nine draft clauses proposed for right to free education as one of the fundamental rights of the citizens. Clause 41 of Draft Clauses under Note on Fundamental Rights by K.T. Shah dated 23 December 1946 provides that, "Every citizen has and is hereby guaranteed the right to free education upto a standard prescribed as the irreducible minimum by the Union Legislature, or the Legislature of any component part thereof."

Thereafter, on 24 January 1947, the Constituent Assembly by a resolution formed an Advisory Committee to determine fundamental rights of citizens, minorities etc. Under clause 3 of the said resolution dated 24 January 1947, the Advisory Committee was empowered to appoint other sub-committees as per its discretion. Clause 3 of the Resolution dated 24 January 1947 provides that, "The Advisory Committee may appoint other sub-committees from time to time as it may deem necessary." Accordingly, in its meeting dated 27 February 1947, the Advisory Committee appointed the Sub-committee on Fundamental Rights among four other sub-committees namely; (i) North-East Frontier Tribal Areas and Assam Excluded and Partially Excluded Areas Sub-Committee, (ii) North-West Frontier Tribal Areas Sub-Committee, (iii) Excluded and Partially Excluded Areas Sub-Committee (except those in Assam), and (iv) Minorities Sub-Committee (Rao, 2021).

The Sub-committee on Fundamental Rights was entrusted with preparation of draft articles on fundamental rights which were to be included in the constitution for independent India. Various notes and draft articles were invited by the members of the Sub-committee wherein the right to free and compulsory elementary education was actively advocated. For instance, the note and draft articles submitted by K.M. Munshi in Article VIII specifically provided for right to free primary education of children upto fourteen years. Article VIII(1) of Draft Articles dated 17 March 1947 prepared by K.M. Munshi provides that, "Every citizen is entitled to have free primary education and it shall be legally incumbent on every unit of the Union to introduce free and compulsory primary education upto the age of 14 years and in the case of adults upto the standard of literacy." Moreover, the draft prepared by Sardar Harnam Singh on Fundamental Rights in its clause 20 specifically provided for free and mandatory elementary education in primary school. A relevant extract of Clause 20 of Draft Articles dated 18 March 1947 prepared by Sardar Harnam Singh provides that, "... Elementary education is obligatory and free in the primary schools".

After detailed discussions on various notes and draft articles submitted by its members and discussions thereupon, the Sub-committee on Fundamental Rights prepared a final report along with draft articles on fundamental rights and submitted the same to the Advisory Committee on 16 April 1947. The said draft articles on fundamental rights consisted of two parts viz. (i) Part I – which provided for justiciable negative rights of the people enforceable in the courts, and (ii) Part II – which provided for non-justiciable positive rights which were in the form of principles of governance for the state and the same were not enforceable in the courts. Due emphasis is laid on the fact that in Article 23 of these draft articles, the right to free and compulsory primary education was provided as a justiciable fundamental right of the citizens which could be enforced in the courts. Article 23 of the Draft Articles dated 16 April 1947 submitted by the Sub-committee on Fundamental Rights states that, "Every citizen is entitled as of right to free primary education and it shall be the duty of the State to provide within a period of 10 years from the commencement of this Constitution for free and compulsory primary education for all children until they complete the age of 14 years."

Due emphasis is laid on the fact that in the proceedings of Advisory Committee, the fate of right to elementary education took a major turn. When the draft Article 23 went to the Advisory Committee for discussions, the same was proposed to be deleted from the justiciable fundamental rights and transferred to the part containing non-justiciable positive rights prescribing for guiding principles of governance for the state. While opposing the right to be justiciable, one of the committee members namely, M. Ruthnaswamy raised a question about enforceability of the said right in the times of financial crunch in the state. Another

member namely, Alladi Krishnaswami Ayyar clearly proposed its deletion from the part containing justiciable rights. However, it was Govind Ballabh Pant, who suggested to make right to education a part of principles of governance for the state, which were non-justiciable in nature. Accordingly, the Advisory Committee finally decided to delete right to elementary education from the justiciable fundamental rights and the same was transferred to the part containing draft articles on fundamental principles of governance, which consisted of positive rights of the citizens, non-justiciable in nature. The draft articles on Fundamental Principles of Governance were finally submitted by the Advisory Committee to the President of Constituent Assembly wherein the right to elementary education found its place in Article 8 of the Fundamental Principles of Governance.

The said Article 8, with deletion of the word “primary” from the phrase “free and compulsory primary education” was adopted as Article 36 in the draft Constitution which was drafted by the Drafting Committee of the Constituent Assembly under the chairmanship of Dr. B.R. Ambedkar. When the said draft article came up for discussions in the Constituent Assembly proceedings, the same received mixed opinions from the members of the Constituent Assembly. In a strong opposition to keep the right to free and compulsory elementary education out of the purview of justiciable fundamental rights, Mr. Z.H. Lari, member of Constituent Assembly, observed that, “The next necessity of the individual is the right to have elementary education. That is singularly absent in the Fundamental Rights. In the Directive Principles of State Policy it is contained that it shall be the endeavour of the State to provide elementary education. My submission would be that is absolutely insufficient. What is necessary is that it should be the duty of the State to provide elementary education and such a provision should exist in the Constitution among the Fundamental articles.” (Lari, 1948). However, in accordance with the majority vote, the words “Every citizen is entitled to free primary education, and” were proposed to be deleted and the word “endeavour” was proposed to be inserted in the draft clause. Accordingly, the Constituent Assembly in its proceedings dated 23 November 1948 finally adopted the subject of free and compulsory elementary education as a part of Directive Principles of State Policy in the following form and manner, “Provision for free and compulsory education for children- The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.” Accordingly, the said clause finally found its place as Article 45 of the unamended and original Constitution of India.

## **5. Transformation of free and compulsory elementary education in India**

Before the 86<sup>th</sup> Constitutional amendment vide Constitution (Eighty-sixth Amendment) Act 2002, the subject of free and compulsory education for children

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upto the age of fourteen years was dealt by Article 45 of the Constitution as one of non-justiciable constitutional directives to the State. Such directive was to be achieved with the period of ten years from the commencement of the Constitution. However, the goal was not achieved even after fifty years of the commencement and the provision remained a dead letter of law having lost its importance with time. In the year 2002, the Parliament acknowledged the failure to work this provision in the object and reasons of the Constitution (Eighty-sixth Amendment) Bill 2001 by providing that, "...We could not achieve this goal even after 50 years of adoption of this provision...". Hence, while acknowledging the aforesaid, the Parliament vide Act of 2002 substantially transformed the educational rights of India through various amendments in Part III, Part IV & Part IVA of the Constitution.

Article 21A has been inserted under Part III of the Constitution prescribing for right to free and compulsory education which can be enforced in a court as a fundamental right. Article 21A of the Constitution of India states that, "Right to education- The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine."

Further, Article 45 has been amended so as to direct the State to provide early childhood care and education for children upto the age of six years. The amended text of Article 45 of the Constitution of India states that, "Provision for early childhood care and education to children below the age of six years – The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years."

Lastly, clause (k) has been inserted in Article 51A providing for duties of parents and guardians to provide opportunities for education their children/ward who are between the age of six to fourteen years. Article 51A(k) of the Constitution of India states that,

"51A. Fundamental Duties – It shall be the duty of every citizen of India—

(k) who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years."

In furtherance of the aforesaid amendments, the Parliament has finally enacted the Right to Free and Compulsory Education Act 2009 with an objective enshrined under that preamble "to provide for free and compulsory education to all children of the age of six to fourteen years". The Act majorly focuses upon the elementary education of children. Section 2(f) of the Right to Free and Compulsory Education Act 2009 defines elementary education as "'elementary education' means the education from first class to eighth class". Moreover, Section 3(1) and 3(2) of the Act specifically provides for right to free and compulsory elementary education. Section 3(1) & (2) of the Right to Free and Compulsory Education Act 2009 provides that,

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“3. Right of child to free and compulsory education. –

(1) Every child of the age of six to fourteen years, including a child referred to in clause (d) or clause (e) of section 2, shall have the right to free and compulsory education in a neighbourhood school till the completion of his or her elementary education.

(2) For the purpose of sub-section (1), no child shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing the elementary education.”

Although the right to free and compulsory elementary education gained the status of a separate fundamental right through parliamentary amendment of the Constitution, however, its foundations were already laid back in the year 2002 wherein the Supreme Court declared right to education as a fundamental right in the case of *Mohini Jain v. State of Karnataka*, 3 SCC 666 (1992). The Supreme Court in the said case observed that, “The directive principles which are fundamental in the governance of the country cannot be isolated from the fundamental rights guaranteed under Part III. These principles have to be read into the fundamental rights. Both are supplementary to each other. The State is under a constitutional mandate to create conditions in which the fundamental rights guaranteed to the individuals under Part III could be enjoyed by all. Without making "right to education" under Article 41 of the Constitution a reality the fundamental rights under Chapter III shall remain beyond the reach of large majority which is illiterate.”

While observing the aforesaid, the Supreme Court held that, “The "right to education", therefore, is concomitant to the fundamental rights enshrined under Part III of the Constitution. The State is under a constitutional-mandate to provide educational institutions at all levels for the benefit of the citizens. The educational institutions must function to the best advantage of the citizens. Opportunity to acquire education cannot be confined to the richer section of the society...”

Conclusively, the Supreme Court in quite unequivocal terms declared that, “We hold that every citizen has a 'right to education' under the Constitution. The State is under an obligation to establish educational institutions to enable the citizens to enjoy the said right. The State may discharge its obligation through State-owned or State-recognised educational institutions. When the State Government grants recognition to the private educational institutions it creates an agency to fulfill its obligation under the Constitution. The students are given admission to the educational institutions - whether State-owned or State recognised in recognition of their 'right to education' under the Constitution...”

Hence, after 50 years from the commencement of the Constitution, the right to free and compulsory elementary education finally culminated into a fundamental right

from a mere constitutional directive. This transformation has been made through enactment and interpretation of the Constitution by the Parliament and Supreme Court respectively by acknowledging the transformative purpose with which the constitution of India was enacted.

## **6. Conclusion**

The inherent dynamism of the constitutional provisions worked by an active supreme court being conscious of the transformative intent of the Indian constitution has truly transformed the lives of people of India into better than it earlier was in the colonial era and also enabled the constitution to become the longest surviving constitution in the post-colonial world. While analyzing constitutional transformation vis-à-vis transformative constitutionalism in the post-colonial India, it can be conveniently concluded that it is important that the letters of the constitutional text must be enacted with enough flexibility so as to meet the progressive needs of the society, but it is equally important that institutions such as judiciary, which infuses life into the dead letter of the constitutional text, must also recognize such transformative element and bring it into practice so as to provide real and substantive justice to people as well as to ensure that the constitution which is worked upon by it endures for ages to come.

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